Bespoke Motoring Sdn Bhd v Am General Insurance Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-251–05 OF 2021
LIZA CHAN J
23 APRIL 2023

Insurance — Motor insurance — Loss or damage to car — Insurance company offered insured RM1,505,250 as total loss value of Ferrari severely damaged in road accident — Insured accepted offer but insurer thereafter revoked offer and repudiated claim — Whether grounds on which insurer repudiated claim were not 'new facts' but matters already known to insurer when it investigated the claim and made the settlement offer — Whether insurer had failed to act in good faith

A Ferrari car belonging to the plaintiff, which the defendant had insured for RM1,790,000, was severely damaged when it was involved in an accident on a highway early on the morning of 5 October 2018. At the time of the accident, the car was driven by the plaintiff's authorised driver, PW2, who was given permission to keep the car for a few days to test-drive the vehicle. According to PW2's testimony, he was driving on the middle lane of the highway when a vehicle suddenly approached from his left and cut into his path. In trying to avoid colliding with that vehicle, PW2 said that he lost control of the Ferrari causing it to go into a spin and finally come to a stop facing the opposite direction against on-coming traffic. PW2 said as he was attempting to put right the direction of the Ferrari, an on-coming car collided into the vehicle, badly damaging it. PW2 said a friend gave him a lift home from the scene of the accident but several hours later he felt severe pain all over his body and went to hospital to find that he had three broken ribs. He was given medical leave for three days after which he lodged a police report about the accident. Upon the plaintiff notifying the defendant about the accident and submitting the necessary claim forms, the defendant carried out its own investigations based on PW2's narrative of the accident. Both the plaintiff and PW2 were also interviewed by the defendant's executive. Finally, several months later, the defendant offered the plaintiff a settlement sum of RM1,505,250 which the plaintiff accepted. However, two months later, the defendant revoked the said offer and repudiated the claim on the grounds that: (a) PW2's police report about the accident was lodged more than 24 hours after it took place; (b) PW2 was intoxicated at the time of the accident and had driven against the flow of traffic; (c) PW2 was charged by the police under R10; and (d) the plaintiff and PW2 had misrepresented the nature of the accident in the claim form which amounted to a fundamental breach of contract and a fraudulent claim. In the instant action, the plaintiff sought, inter alia, a declaration that the defendant's revocation of the settlement offer and/or repudiation of the claim and/or of the

insurance policy was unlawful, void and of no effect. It also sought an order that the defendant pay the plaintiff the sum of RM1,505,250 as agreed or such other sum deemed reasonable by the court. The defendant contended that the settlement offer it made was conditional and without admission of liability and subject to the plaintiff's full compliance with the terms and conditions of the insurance policy and that it was entitled to revoke the offer and repudiate the claim based on 'new evidence' about the crash.

Held, allowing the plaintiff's claim including for payment of the sum of RM1,505,250:

(1) Based on the evidence, the fact that PW2 lodged the police report about the accident more than 24 hours after it happened, and that he was summoned by police under R10 and that he had driven against the flow of traffic when the accident happened were not new matters which the defendant discovered subsequent to its making the settlement offer. PW2's narrative of the accident in his police report, in the claim form submitted to the defendant and when he was interviewed by the defendant's executive, DW1, was the same (see paras 27 & 29–31).

(2) By the time the defendant had received the claim forms and conducted its interviews of the plaintiff and PW2, it was fully aware of PW2's narrative of how the accident took place including PW2's assertion that he was not under the influence of alcohol at the material time. In fact, DW1 had confirmed under cross-examination that there were no material inconsistencies in PW2's version of the accident in his police report, in the claim form and in the interview and that after five months of investigating the accident, the defendant decided to approve the plaintiff's claim and make the settlement offer (see paras 32 & 34–36).

(3) The 'new discovery' and dominant factor which caused the defendant to repudiate the plaintiff's claim was the issue that PW2 was intoxicated at the time of the accident. However, that allegation was never proven at the trial (see paras 43–50).

(4) The cumulative evidence of the defendant's own witnesses, particularly DW1, DW2 and DW4 imploded the defendant's case founded on PW2's driving against the flow of traffic whilst being intoxicated. The evidence for the defence as a whole did not destroy the probative value of PW2's evidence. The court accepted PW2's version of how the accident happened, the circumstances that caused him to lose control of the car as well as to drive against the flow of traffic. PW2's account of the events that took place was not inherently improbable. His evidence was not credibly challenged in cross-examination (see paras 54–56).

(5) On a consideration of the entire evidence, there was no doubt in the court's mind that there was no active or fraudulent concealment of facts

or failure to make full and frank disclosure by the plaintiff or PW2 in relation to the accident. The evidence did not support the defendant's posit that the plaintiff had made a false or fraudulent or exaggerated claim or that it had breached the duty of utmost good faith owed to the defendant. On the contrary, the evidence as a whole showed a failure on the defendant's part to prove on balance of probabilities that it was entitled to repudiate the policy (see para 57).

(6) It was both fascinating and adventurous that the defendant, after already having had knowledge at the time of making the settlement offer of all the factors mentioned in its repudiation letter (save the alleged intoxication which it miserably failed to prove at the trial), could do a complete *volte face* by whipping up an argument allegedly based on 'new discoveries' to deny payment to the plaintiff. This hardly demonstrated good faith on the part of the defendant. It sounded hollow and was an ill-conceived machination which was not to be countenanced by the court (see para 61).

(7) The plaintiff was entitled to the declaration sought and to judgment in the sum of RM1,505,250 being the market value of the car on a total loss basis after deduction of excess. The sum awarded was the same amount the defendant had offered to the plaintiff in its settlement offer (see paras 62–63).

[Bahasa Malaysia summary

Sebuah kereta Ferrari milik plaintif, yang diinsuranskan defendan dengan harga RM1,790,000, rosak teruk apabila terlibat dalam kemalangan di lebuh raya pada awal pagi 5 Oktober 2018. Ketika kemalangan, kereta tersebut dipandu oleh pemandu sah plaintif, PW2, yang diberi kebenaran untuk menyimpan kereta tersebut selama beberapa hari untuk memandu uji kenderaan tersebut. Menurut keterangan PW2, beliau sedang memandu di lorong tengah lebuh raya apabila sebuah kenderaan tiba-tiba menghampiri dari kirinya dan memotong laluannya. Dalam usaha mengelak daripada berlanggar dengan kenderaan tersebut, PW2 berkata beliau hilang kawalan terhadap Ferrari tersebut menyebabkan ia berpusing dan akhirnya berhenti menghadap arah bertentangan menentang lalu lintas yang menghampiri. PW2 berkata ketika beliau cuba membetulkan arah Ferrari tersebut, sebuah kereta yang datang bertembung dengan kenderaan tersebut, menyebabkannya rosak teruk. PW2 berkata, seorang rakan menumpangkannya pulang dari tempat kejadian tetapi beberapa jam kemudian beliau berasa sakit teruk di seluruh badan dan pergi ke hospital untuk mendapati beliau patah tiga tulang rusuk. Beliau diberi cuti sakit selama tiga hari selepas itu beliau membuat laporan polis mengenai kemalangan tersebut. Setelah plaintif memberitahu defendan tentang kemalangan tersebut dan mengemukakan borang tuntutan yang diperlukan, defendan menjalankan siasatannya sendiri berdasarkan naratif PW2 tentang kemalangan tersebut. Kedua-dua plaintif dan PW2 juga telah ditemu bual oleh

eksekutif defendan. Akhirnya, beberapa bulan kemudian, defendan menawarkan kepada plaintif sejumlah wang penyelesaian sebanyak RM1,505,250 yang plaintif terima. Bagaimanapun, dua bulan kemudian, defendan membatalkan tawaran tersebut dan menolak tuntutan atas alasan: (a) laporan polis PW2 tentang kemalangan tersebut dibuat lebih 24 jam selepas ia berlaku; (b) PW2 mabuk pada masa kemalangan dan telah memandu melawan arus lalu lintas; (c) PW2 telah didakwa oleh polis di bawah R10; dan (d) plaintif dan PW2 telah tersalah tafsir sifat kemalangan dalam borang tuntutan yang merupakan pelanggaran asas kontrak dan tuntutan palsu. Dalam tindakan semasa, plaintif memohon, antara lain, satu deklarasi bahawa pembatalan tawaran penyelesaian dan/atau penolakan defendan terhadap tuntutan dan/atau polisi insurans adalah menyalahi undang-undang, tidak sah dan terbatal. Ia juga memohon perintah supaya defendan membayar plaintif sejumlah RM1,505,250 seperti yang dipersetujui atau jumlah lain yang difikirkan munasabah oleh mahkamah. Defendan berhujah bahawa tawaran penyelesaian yang dibuatnya adalah bersyarat dan tanpa pengakuan liabiliti dan tertakluk kepada pematuhan penuh plaintif terhadap terma dan syarat polisi insurans dan ia berhak untuk membatalkan tawaran dan menolak tuntutan berdasarkan 'bukti baharu' tentang kemalangan tersebut.

Diputuskan, membenarkan tuntutan plaintif termasuk pembayaran jumlah RM1,505,250:

(1) Berdasarkan keterangan, fakta bahawa PW2 membuat laporan polis mengenai kemalangan tersebut lebih daripada 24 jam selepas ia berlaku, dan bahawa beliau telah disaman oleh polis di bawah R10 dan bahawa beliau telah memandu melawan arus trafik semasa kemalangan tersebut berlaku bukanlah perkara baharu yang ditemui oleh defendan selepas membuat tawaran penyelesaian. Naratif PW2 tentang kemalangan tersebut dalam laporan polisnya, dalam borang tuntutan yang dikemukakan kepada defendan dan semasa beliau ditemu bual oleh eksekutif defendan, DW1, adalah sama (lihat perenggan 27 & 29–31).

(2) Pada masa defendan telah menerima borang tuntutan dan menjalankan temu bualnya terhadap plaintif dan PW2, ia menyedari sepenuhnya naratif PW2 tentang bagaimana kemalangan tersebut berlaku termasuk penegasan PW2 bahawa beliau tidak berada di bawah pengaruh alkohol pada masa material. Malah, DW1 telah mengesahkan di bawah pemeriksaan balas bahawa tiada percanggahan material dalam versi kemalangan PW2 dalam laporan polisnya, dalam borang tuntutan dan dalam temu bual dan bahawa selepas lima bulan menyiasat kemalangan tersebut, defendan memutuskan untuk meluluskan tuntutan plaintif dan membuat tawaran penyelesaian (lihat perenggan 32 & 34–36).

(3) Faktor 'penemuan baharu' dan dominan yang menyebabkan defendan menolak tuntutan plaintif adalah isu PW2 mabuk semasa kemalangan.

Bagaimanapun, dakwaan tersebut tidak pernah dibuktikan semasa perbicaraan (lihat perenggan 43–50).

(4) Keterangan terkumpul saksi defendan sendiri, khususnya DW1, DW2 dan DW4 memudaratkan kes defendan berdasarkan pemanduan PW2 melawan arus trafik semasa mabuk. Keterangan bagi pembelaan secara keseluruhannya tidak memusnahkan nilai probatif keterangan PW2. Mahkamah menerima versi PW2 tentang bagaimana kemalangan tersebut berlaku, keadaan yang menyebabkan beliau hilang kawalan ke atas kereta serta memandu melawan arus lalu lintas. Kisah PW2 tentang peristiwa yang berlaku sememangnya tidak mustahil. Keterangan beliau tidak boleh dicabar dalam pemeriksaan balas (lihat perenggan 54–56).

(5) Atas pertimbangan keseluruhan keterangan, tidak ada keraguan dalam pemikiran mahkamah bahawa tidak ada penyembunyian fakta yang aktif atau penipuan atau kegagalan untuk membuat pendedahan penuh dan nyata oleh plaintif atau PW2 berhubung dengan kemalangan tersebut. Keterangan tersebut tidak menyokong pendirian defendan bahawa plaintif telah membuat tuntutan palsu atau penipuan atau berlebihan atau bahawa ia telah melanggar kewajipan berniat baik terhadap defendan. Sebaliknya, keterangan secara keseluruhan menunjukkan kegagalan di pihak defendan untuk membuktikan berdasarkan imbangan kebarangkalian bahawa ia berhak untuk menolak polisi (lihat perenggan 57).

(6) Ia adalah menarik dan mencabar bahawa defendan, setelah mempunyai pengetahuan pada masa membuat tawaran penyelesaian semua faktor yang disebutkan dalam surat penolakannya (kecuali dakwaan mabuk yang gagal dibuktikan pada perbicaraan), boleh melakukan *volte face* dengan mengemukakan hujah yang didakwa berdasarkan 'penemuan baharu' untuk menafikan pembayaran kepada plaintif. Ini hampir tidak menunjukkan niat baik di pihak defendan. Ia kedengaran kosong dan merupakan komplot yang baik yang tidak boleh diterima oleh mahkamah (lihat perenggan 61).

(7) Plaintif berhak mendapat deklarasi yang dimohon dan penghakiman dalam jumlah RM1,505,250 sebagai nilai pasaran kereta tersebut berdasarkan jumlah kerugian selepas ditolak lebihan. Jumlah yang diberikan adalah jumlah yang sama yang telah ditawarkan oleh defendan kepada plaintif dalam tawaran penyelesaiannya (lihat perenggan 62–63).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Ayoromi Helen v PP [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292, FC (refd)
Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)
Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710, CA (refd)
Malaysia British Assurance Bhd v Syarikat Pembenaan Karun Sdn Bhd [2008] 6 MLJ 533; [2009] 4 CLJ 1, CA (refd)
Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and others [2003] 1 AC 469, HL (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)
Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd) [2014] 11 MLJ 186; [2014] 3 CLJ 745, HC (refd)
Saurashtra Chemicals Ltd v National Insurance Co Ltd (2019) 19 SCC 70, SC (folld)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)

Legislation referred to

Financial Services Act 2013 Schedule 9, para 5(9)
Road Transport Act 1987 s 42

Ashok Kandiah (with Celinne Teh and Mishand Patmanthan) (Kandiah Partnership) for the plaintiff.
JS Naicker (with Kishan) (Naicker & Assoc) for the defendant.

Liza Chan J:

INTRODUCTION

[1] The plaintiff's vehicle was involved in an accident that took place on 5 October 2018. This action was filed by the plaintiff against the defendant as insurer for relief as follows:

(a) a declaration that the defendant's revocation of the settlement offer dated 22 February 2019 and/or repudiation of the plaintiff's claim and/or insurance policy is unlawful, void and of no effect;

(b) the defendant to pay the plaintiff the sum of RM1,505,250; and/or

(c) alternatively, the defendant to pay the plaintiff other such sums deemed reasonable by this honourable court.

[2] After a full trial held over four days conducted virtually online by using

A the Zoom video conferencing platform during which, the plaintiff called two witnesses whilst the defendant called four witnesses, I had on 10 February 2023 allowed the plaintiff's claim with costs, and given broad reasons for my decision. This judgment contains the full reasons for my decision.

B BACKGROUND FACTS

[3] The plaintiff is the registered owner of a motor vehicle bearing registration No TBR 1 ('the car').

C **[4]** The plaintiff purchased a comprehensive premier insurance policy No W1817092 01–C1 ('the policy') from the defendant through which the car was insured for a value of RM1,790,000 with effect from 30 August 2018.

D **[5]** On 5 October 2018, the car, driven by one, Lee Koon Teng was involved in a collision with another motor vehicle bearing registration No NCJ 4733 along Maju Express Way Sdn Bhd ('MEX Highway') which resulted in severe damage to the car ('the accident').

E **[6]** On 13 October 2018, the plaintiff had notified the defendant of the accident. The plaintiff then issued a motor accident notification/claim form on the same date to the defendant. The defendant had also taken possession of the car.

F **[7]** On 22 February 2019, the defendant had offered in writing a settlement value of RM1,505,250 ('the settlement offer') to the plaintiff.

[8] The plaintiff accepted the settlement offer by executing the 'Beyond** G Economic Repair Discharge Voucher' issued by the defendant.

[9] Two months later, by letter dated 26 April 2019, the defendant repudiated the plaintiff's claim and revoked the settlement offer on the basis that:

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(a) the driver (PW2) had only lodged a police report on 8 October 2018 more than 24 hours after the said accident;

(b) PW2 had driven the plaintiff's vehicle against the flow of traffic due to him being intoxicated at the time of the said accident;

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(c) PW2 was charged by the police under R10; and

(d) the plaintiff and PW2 had misrepresented the nature of the accident in the claim form which amounts to a fundamental breach of contract and consequently a fraudulent claim.

[10] Dissatisfied with the turn of events, the plaintiff filed this action.

THE PLAINTIFF'S CASE

[11] In essence, the plaintiff's case is that:

(a) it is entitled to be indemnified the loss or damage by the plaintiff based on the following clause of the policy:

> Section 1: Loss or Damage to Your Own Vehicle
>
> 1. Covered
>
> *We will cover your vehicle when any incident happens during the period of insurance and causes loss or damage to your vehicle as listed below*:-
>
> Events we cover
>
> *Accidental damage that is caused unintentionally to your vehicle including*:
>
> – Accidental collision or overturning ...

(b) the defendant's grounds to repudiate the policy are baseless, and an afterthought by the defendant, in an attempt to wrongfully deny the plaintiff of its lawful claim pursuant to the policy.

THE DEFENDANT'S CASE

[12] The defendant in its defence in summary pleaded:

(a) the version of the accident reported by the plaintiff's authorised driver in the police report dated 8 October 2018 and claim form dated 22 October 2018 are false and made with the intention of making a fraudulent claim under the policy;

(b) the failure by the plaintiff and PW2 to disclose the actual circumstances of the said accident, is in breach of their duty under the insurance contract to make full, frank and honest disclosures in good faith when dealing with the defendant;

(c) driving against the flow of traffic recklessly which resulted in the accident with Honda motorcar bearing registration number NCJ 4733;

(d) driving under the influence of alcohol;

(e) the letter dated 22 February 2019 which the plaintiff had accepted was a *conditional* offer to settle made without admission of liability and subject to the plaintiff's full compliance to the terms and conditions of the policy;

(f) the defendant is entitled to revoke the conditional offer to settle and to repudiate the claim via their repudiation notice dated 26 April 2019 in

A view of the new evidence being the daily event log sheet and CCTV footage obtained from the MEX Highway authorities depicting that the insured motorcar had driven against the flow of traffic; and

(g) the plaintiff lodged the police report more than 24 hours after the accident.

B

SETTLING THE ISSUES IN THIS ACTION

[13] The parties could not/did not agree on the issues to be tried.

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[14] The defendant's learned counsel Mr JS Naicker in his written submission contended that the plaintiff's claim raised two issues, namely:

(a) are the plaintiff and his agent (the driver of the car) in breach of their duty to make full, frank and honest disclosure in good faith, when they suppressed from the defendant, that the car was actually being driven against the flow of traffic for a considerable distance? and

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(b) does the conduct of driving the car against the flow of traffic along a three lane highway, for a considerable distance tantamount to reckless use of the insured vehicle?

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[15] The plaintiff's learned counsel Mr Ashok Kandiah assailed the above contention and submitted that the defendant cannot resist the claim on grounds beyond those cited in its letter dated 26 April 2019 while repudiating the claim. In support of this argument, Mr Ashok referred to a decision of the Indian Supreme Court in the case of *Saurashtra Chemicals Ltd v National Insurance Co Ltd* (2019) 19 SCC 70. In this judgment, it has been held:

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> 22. Hence, we are of the considered opinion that the law, as laid down in Galada (*Galada Power & Telecommunication Ltd v United India Insurance Co. Ltd.,* (2016) 14 SCC 161; (2017) 2 SCC (Civ) 765) on Issue (2), still holds the field. *It is a settled position that an insurance company cannot travel beyond the grounds mentioned in the letter of repudiation. If the insurer has not taken delay in intimation as a specific ground in letter of repudiation, they cannot do so at the stage of hearing of the consumer complaint before NCDRC.* (Emphasis added.)

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[16] The case of *Saurashtra Chemicals Ltd* involved a claim relating to a standard fire and special perils policy. Repudiation was solely on the ground that a spontaneous combustion did not result into fire and loss had not been caused by the fire as stipulated by policy conditions. The insured then approached the National Consumer Disputes Redressal Commission ('NCDRC'). One of the defenses taken by the insurance company in the NCDRC was that the intimation of claim was delayed for over a month. The delay, according to the insurance company vitiated condition 6(i) of the general conditions of the policy in that case. The insurance company succeeded before

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the NCDRC. The insured's appeal was heard and decided by the Supreme Court. The main point before the court on which the case turned was that the insurance company took a defense which did not form the basis of repudiation of the claim. It is in that context that the Supreme Court held that this was impermissible. The reasoning of the court appeared in para 22 of the report, which is produced above.

[17] I agree with the ratio of the decision in the case of *Saurashtra Chemicals Ltd*. It should be the case here. As such, I hold that the defendant in the present case in its defence of the instant claim ought not to have gone beyond the grounds and be permitted to raise issues other than those stated in its letter dated 26 April 2019 while repudiating the claim.

[18] The defendant's own evidence through DW1 during cross-examination fortifies this stance:

> AK: Alright, okay. Now, so coming back to the, to the repudiation itself. Yesterday I took you through events until the offer of 22nd February 2019, alright. Now, let us look at the event that led, that you say or the defendant says led to the repudiation of the policy. Can you look at page 74, please. Mr Cheong.
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> DW1: Okay.
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> AK: Alright. Alright, now, we have dealt, can you come down, please. Can you bring it down. Look, go to paragraph 3, alright. *So, let us look at paragraph 3, you would agree with me that paragraph 3, everything that is stated here forms the basis of the repudiation of the policy?*
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> DW1: *Correct.*
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> AK: *Correct, and there are no other factors that the defendant relies on. Mr Cheong?*
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> DW1: *Correct.*

[19] Added to that, there is also the contents of the defendant solicitors' letter dated 8.5. 2019 to the plaintiff's previous solicitors which repeated the basis of the repudiation:

> 4. Since the, it has been brought to our client's attention that your client had breached various conditions of the said PCP. In particular, General Conditions 2(7) of Section 6 of the PCP, whereby your authorised driver, benig under the influence of alcohol, had driven on the wrong side of the highway (*lawan arus*) thereby colliding into m/car NCJ 4733 causing serious injuries to a third party.

[20] Mr Ashok therefore contended that:

(a) the defendant cannot assert that the plaintiff had suppressed from the defendant the fact that the car was being driven against the flow of traffic 'for a considerable distance'. The words 'for a considerable distance' is

clearly a new addition and must necessarily be an afterthought. That the car was being driven against the flow of traffic was always disclosed by the plaintiff and known to the defendant;

(b) the defendant's pleaded case is that the car was being driven against the flow of traffic, not driven against the flow of traffic 'for a considerable distance';

(c) the evidence in this case, based on PW2's testimony and the CCTV footage, show that the car was being driven against the flow of traffic for only 100 or 200 metres prior to the collision occurring;

(d) the defendant's reliance on the same being equated to 'a considerable distance' is at most baseless, or at the very least a complete exaggeration, and a convenient and strategic position taken during submissions given the defendant's inability to discharge its burden of proof. Mr Ashok referred to the case of *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and others* [2003] 1 AC 469 where the House of Lords at para 83, p 507 held:

> The judge's reference to the Connecticut court is a reference to the judgment of the Supreme Court of Connecticut in *Rego v Connecticut Insurance Placement Facility* 593 A 2d 491. Callahan AJ, in whose opinion the other justices concurred, said, at p 497:
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> > If the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. *To permit the insurer to await the testimony at trial to create a further ground for escape from its contractual obligation is inconsistent with the function the trial normally serves.* (Counsel's emphasis.)

[21] Based on Mr Ashok's objections as commended above to me, I will thus, in deciding the instant case, frame the issues as follows:

(a) is the defendant entitled to deny payment to the plaintiff on the grounds stated in its letter dated 26 April 2019 while repudiating the claim?

(b) is the plaintiff entitled to be indemnified from loss and recover the amount, if any, due to it on the policy? and

(c) if so, what relief is the plaintiff entitled to?

THE LAW

Mutual duty of good faith

[22] It is elementary that insurance contracts are contracts *uberrimae fidei*, a

Latin phrase which means 'utmost good faith'. Fundamental to the contractual relationship between the insured and the insurer is the exercise of good faith. In *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710, the Court of Appeal speaking through Gopal Sri Ram JCA held:

> [15] It is settled beyond dispute that *a contract of insurance is one that imposes mutual duty on the parties to it to act uberrimae fides towards each other.* ... On the part of the insured, he or she must make full and frank disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material ... The duty is on the insured to make full disclosure of material facts within his knowledge.
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> ...
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> [19] So much for the insured's duty. For completeness I would add that *there is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured*. In *Maschke Estate v Gleeson* (1986) 54 OR (2d) 753 at p 756, Montgomery J put the duty in this way:
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> > A contract of insurance is one of uberrimae fides, the utmost of good faith. This is not a situation where an insurer is indemnifying its assured and paying a third party. *This is a case where the insurer is being asked to pay its own insured. The duty to act promptly and in good faith arises the day the insurer receives the claim. To find otherwise is to fail to understand the realities of the market place*.
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> [20] More recently, in *Katotikidis v Mr Submarine Ltd* [2002] ACWSJ 10135, Taliano J referred to the judgment of the Supreme Court of Canada in *Whiten v Pilot Insurance Company* [2002] 209 DLR (4th) 257 as follows:
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> > I note that in upholding the award of punitive damages in Whiten, the court observed that *a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer when a loss occurs.* For that reason, in every contract of insurance, *an insurer has an implied obligation to deal with the claims of its insured's in good faith.* It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong. (Emphasis added.)

Construction of the policy

[23] As made clear by the Court of Appeal in *Malaysia British Assurance Bhd v Syarikat Pembenaan Karun Sdn Bhd* [2008] 6 MLJ 533; [2009] 4 CLJ 1, the words in an insurance policy ought to be construed according to their plain and ordinary meaning. This rule of construction is however subject to exceptions, one of which is the intention of the parties and the object of the insurance policy. Ahmad Maarop JCA (later CJ (Malaya)) delivering judgment of the Court of Appeal said:

> [21] *That a policy of insurance is basically subject to the same rules of construction as any other written contract is abundantly clear* from the authorities. In the words of Hashim Yeop A Sani FJ delivering the judgment of the Federal Court in *Provincial Insurance Co Ltd v Yee Chee Swee*:

> *the words used in it must be given their plain, ordinary meaning but in the context of the policy looked at as a whole and subject to any special definition contained in the policy*.
>
> [22] The rule that the policy, like all other instruments, is to be construed according to its sense and meaning, as collected from the words used in it, which are to be understood in their plain and ordinary meaning was established as early as in 1803 in *Roberton v French* [1803] 4 East 130. That the words in the policy is to be understood in their plain, ordinary and popular sense is *subject to a number of exceptions, one of which being that the context evidently points out that the words must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special or peculiar sense. This is clear from the judgment Lord Ellenborough CJ stated in that case*: ...
>
> [23] In construing the policy, the object of the parties is to be steadily borne in mind and the policy must not be construed so as to defeat that object, nor as to render it practically illusory. This was stated by Lindley LJ, delivering the judgment of the English Court of Appeal in *Cornish v The Accident Insurance Company Ltd* [1889] QBD Vol XXIII, 453 ...

Burden of proof

[24] There is no dispute that:

(a) PW2 was an authorised driver of the plaintiff;

(b) the accident had occurred during the period of insurance under the policy; and

(c) the Ferrari car has been damaged.

[25] Once the plaintiff has proven on a balance of probabilities that the plaintiff has suffered loss and damage due to the accident, the onus shifts to the defendant to justify the defendant's repudiation. In *Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd)* [2014] 11 MLJ 186; [2014] 3 CLJ 745, Prasad Sandosham Abraham J (later FCJ) decided as follows in the High Court:

> [3] ... The onus is on the insurance company ie, the defendant to justify the repudiation of the plaintiff's claim under the policy.

EVALUATION AND FINDINGS

Issue 1 — Is the defendant entitled to deny payment to the plaintiff on the grounds stated in its letter dated 26 April 2019 while repudiating the claim?

[26] I deal with the grounds set out in the repudiation letter dated 26 April 2019. The crucial question before me is whether there is any basis to the grounds stated in the defendant's letter of 26 April 2019, considered against the

backdrop of circumstances leading to the settlement offer. At the outset, I ought to say that on the facts of the present case, I am in accord with the arguments canvassed by the plaintiff's counsel and I adopt his submissions in these grounds.

[27] My evaluation of the evidence show that the defendant was no stranger to the three grievances that: (i) the driver (PW2) had only lodged a police report on 8 October 2018 more than 24 hours after the said accident; (ii) PW2 was summoned by the police under R10; and (iii) PW2 was driving against the flow of traffic. These are not new matters which the defendant discovered subsequent to the settlement offer. DW1 deposed to this effect under incisive cross-examination:

> Pg 204 of the NOE (report lodged after 24 hours):
>
> AK: ... *Alright, now you would agree with me, that the fact of the police report having been lodged after 24 hours is not a new discovery?*
>
> DW1: *Correct.*
>
> AK: Correct, *because you al ready knew i t way in the October 2018 and you in fact approved the claim with that knowledge?*
>
> DW1: Correct.
>
> Pg 207 of the NOE (driver summoned by police under Rule 10):
>
> AK: You disagree, alright. Let us move on, okay. Now, and then you look at 3.3, alright. '*Your driver was subsequently charged by the police under Rule 10*'.
>
> DW1: Yes.
>
> AK: *You are referring to a traffic summons that was issued by the police, is it not?*
>
> DW1: *Correct*.
>
> AK: Correct, *alright and you would agree with me that this is not a new discovery? At the time you wrote this letter there was al ready disclosure of this fact.*
>
> DW1: *Yes*.
>
> Pg 158 of the NOE (driving against the flow of traffic)
>
> AK: Trying to do a translation here, you would agree with me on a, on a, on a fair reading of this statement *it reflects the drive driving against the flow of traffic*?
>
> DW1: *Correct.*

[28] I should digress a little and set out PW2's narrative. He testified:

(a) the accident took place at approximately 1:30am on 5 October 2018, when he was driving the car; at the material time, he was driving the car back to his home towards Kuala Lumpur after dropping off a friend at Seri Kembangan;

(b) at that time, he was driving along the middle lane of the said highway when an unknown vehicle had approached from his left and suddenly

switched lanes onto his path of travel. In an attempt to avoid the said unknown vehicle, he had lost control of the car causing it to spin into a U. That action in avoiding the unknown vehicle had caused the car to swerve and spin onto oncoming traffic. Upon driving for a few hundred meters to figure out how he could manoeuvre the car back to the correct direction, another vehicle bearing registration number NCJ 4733 ('the Honda') had collided into the car;

(c) after the accident, he was disorientated, and noticed that the car was badly damaged. He then contacted a friend who had later arrived at the scene of the accident. Upon attending to the other driver, dealing with the workshop and tow truck operators, and waiting for an ambulance to arrive at the scene to attend to the other driver, he got a lift home from his friend. The workshop and tow truck operator assured PW2 that he would deal with the car and that PW2 could leave the scene;

(d) on the very same day, he had began feeling severe pain to his chest, back and abdomen. As a result of the unbearable pain, he visited Sunway Medical Centre for treatment, where he was diagnosed to have suffered from three broken ribs, and was given medical leave for a period of three days up till 7 October 2018; and

(e) the very next day (after his medical leave had ended), he had lodged a police report relating to the accident.

[29] In the police report, PW2 had stated that whilst driving from Seri Kembangan to his home, at 10.6km MEX, a vehicle had suddenly switched lane, in avoiding the vehicle, he lost control causing the car to face the opposite direction and subsequently colliding with the Honda.

[30] A claim form was submitted to the defendant, wherein PW2 had again maintained his version of the accident. In the claim form, PW2 had admitted that he was summoned by the police as a result of the accident (CBD1 p 110), and that he was not under the influence of alcohol at the material time of the accident (CBD 1 p 109).

[31] On 22 January 2019, both PW1 and PW2 were interviewed by DW1, who was an executive of the defendant. During these interviews:

(a) PW1 confirmed that PW2 was an authorised driver of the car, who was given permission to keep the car for a few days whilst PW1 was overseas, to test drive the car; and

(b) PW2 had maintained the same version of the accident as per his police report and claim form (CBD 1 pp 112–121).

[32] It bears mention that by this time (after submission of claim form and interview), the defendant was fully aware of the following: A

(a) PW2 was the authorised driver of the car;

(b) the accident had occurred whilst PW2 was driving against the flow of traffic; B

(c) this action was caused by PW2 avoiding an unknown vehicle which had suddenly turned into his path of travel, thus resulting in PW2 losing control of the car and it swerving to the opposite direction;

(d) PW2 was summoned as a result of the accident; and C

(e) PW2 had stated that he was not under the influence of alcohol at the material time of the accident.

[33] Upon receipt of the plaintiff's claim, the defendant had appointed its internal investigators to investigate the circumstances leading to the accident. D

[34] As a matter of fact, DW1 himself confirmed under cross-examination that based on the versions provided by PW2 in his police report, claim form, and interview, there w ere no material inconsistencies in PW2's version and further, after five months of investigating the accident, the defendant had approved the plaintiff's claim based on the fact that there were no inconsistencies found with regards to PW2's version of the accident: E

Pg 147 of the NOE F

AK: Alright, so having looked at Mr Dinesh's report, you found in your, and, and, and this is to, to quote you, we thought, not you to be fair the defendant. *The defendant did not detect any major discrepancy in the claims notification, correct?*

DW1: *Correct.*

AK: *So, the discrepancy that you are talking about Mr Cheong is, any discrepancy between the police report, the claims notification as well as the statements that were recorded from Mr Foong and Mr Lee?* G

DW1: *Yes*.

AK: Correct, Mr Cheong? H

DW1: Yes, correct.

AK: Okay, so in, and again I am, I am going to, I am, I am going to phase it differently, alright. *When you say you we did not detect any major discrepancy, alright, you would agree it also, it, you, you, you were also able to form the view that the versions in all the documents you had at your disposal at that time, were consistent?* I

DW1: *Agreed*.

AK: Or maybe I will, maybe I will rephrase that. *There was no material inconsistency?*

DW1: *Agreed*.

Pg 148 of the NOE

AK: And *you have finally decided to approve the claim* and that i f I may refer Mr Cheong to, page 69 *on the 22nd of February 2019, which is one month after the interview session* , right. So you would agree, *over a period of 5 months, the defendant investigated the claim and approved the claim because all the documents that you had as at that dated did not show up any material inconsistency?*

DW1: *Agreed.*

[35] Indeed, significantly, DW1 also testified that both the police report and claim form were consistent in that they disclosed that at the material time of the accident, PW2 was driving against the flow of traffic:

Pg 158 of the NOE

AK: Again he says this, alright if you look at the claim submissions, menukar lorong kereta, sebuah kereta menukar lorong, mengelak kereta tersebut, hilang kawalan, mengakibatkan kereta saya menghala ke arah bertentangan. You agree with me even in the claim submission it is declared that another car caused him to lose control of his vehicle that caused him to, to then go towards the opposite direction.

DW1: Okay.

AK: Trying to do a translation here, you would agree with me on a, on a, on a fair reading of this statement *it reflects the drive driving against the flow of traffic?*

DW1: *Correct.*

AK: *Correct?*

DW1: Correct.

AK: Alright, now Mr Cheong again I, I, if the judge allows me then I am just going to ask you once again, *premised on these statements and the statement at page 112 from the driver the defendant approved the claim, correct*?

DW1: *Agreed*.

[36] As the saying goes, the rest is history as the defendant did by way of a letter dated 22 February 2019 approved the plaintiff's claim, and provided the plaintiff with the settlement offer, which in this court's view, thereby waived any alleged breach by the plaintiff. The settlement offer was accepted by the plaintiff with PW1, signing and returning the 'Beyond Economic Repair Discharge Voucher' to the defendant.

[37] At any rate, I find the defendant's reliance on PW2 being summoned under R10 to prove that he was reckless is both ludicrous and untenable as it is antithetical to the very purpose why an insurance policy is bought, inter alia, for financial loss as a result of bodily injury, property damage including damage or loss to a third party's property as a result of an accident caused by one's vehicle whether due to negligence or otherwise. If this ground holds water, as Mr Ashok puts it, most claims will be repudiated by the insurers. Besides, I take

judicial notice that pursuant to the Road Transport Act 1987, it is compulsory for all car owners in Malaysia to have a valid car insurance and road tax, both of which need to be renewed annually.

[38] As for the accident not being reported within 24 hours (even if I was wrong that there is no waiver) the fundamental question is, is the defendant prejudiced considering also that PW2 was on medical leave due to three broken ribs? Prejudice was not shown, and I would be slow to hold that failure to comply with such a requirement under the policy is fatal. Insisting on strict compliance for its own sake serves no useful purpose when prejudice is not shown. I can be forgiven to find that this ground is raised as an ill conceived afterthought.

[39] Side tracking a little, I had earlier held that the defendant is not entitled to deviate from the grounds mentioned in the letter of repudiation and cannot now introduce the two issues of: (i) whether the plaintiff and his agent (the driver of the car) are in breach of their duty to make full, frank and honest disclosures in good faith, when they suppressed from the defendant, that the car was actually being driven against the flow of traffic for a considerable distance; and (ii) Does the conduct of driving the car against the flow of traffic along a three lane highway, for a considerable distance tantamount to reckless use of the insured vehicle.

[40] Even if I am wrong, in so holding, it bears mention that:

(a) the defendant's pleaded case is that the car was driven against the flow of traffic, not driven against traffic for a 'considerable distance'; neither does the repudiation letter speak of car being driven for a 'considerable distance'. This material fact which is not pleaded, it has to follow that all evidence relevant to the unpleaded fact must be disregarded. It is established law that parties are confined to their pleadings and courts are to decide on issues raised in them. The confinement of issues within the four corners of the pleadings, amongst others, help the court to identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly. Parties are not entitled to 'throw the whole kitchen sink' in their submissions for the court to sort out. In the latest case on this subject, in *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292, the Federal Court held:

> [27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v*

A *Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the B parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In the *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract C as well as a claim for libel.

(b) specifically, the Federal Court in the case of *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 had held that:

D [60] It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see: State Government of *Perak v Muniandy* [1986] 1 MLJ 490 *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 and *Blay v Pollard and* E *Morris* [1930] 1 KB 628).

(c) there is a paucity of evidence that the car was in fact driven against the flow of traffic for a 'considerable distance' such as to amount to reckless use of the car. Firstly, the CCTV video footage does not bear this out. Second, DW3's evidence puts paid the issue. DW3 testified of him F having been allegedly informed of the vehicle being driven against the flow of traffic for over 10km from Kg Pandan but admitted he did not record it in the MEX Daily Event Log Sheet. As to why not, he testified as follows:

G Pg 296–297 of the NOE

SV: Tak masukkan dalam log book, sila jelaskan.

DW3: Ok pada malam i tu bila terjadi yang benda ni, bila dapat info la daripada user ... kami takkan masukkan terus kerana kadang-kadang user ni H dan dia orang banyak mistake untuk highway link. Kadang-kadang la dia orang akan cakap ... ok ... ah ... sini ada accident, situ ada accident tapi bukan untuk Highway MEX ...

[41] As it happens, when the court sought clarification from him, DW3 I confirmed that he was unsure as to whether or not PW2 had in fact driven against the flow of traffic for a distance of 10km:

Pg 292 of the NOE

YA: Yang soalan tu, yang soalan tu, Encik tak pasti kerana tak tahu bahawa ada berlaku sebenarnya ...

DW3: Ok saya akan ambil ...

YA: Yang ... *yang memandu melawan arus* ...

AK: *Untuk 10 kilometer.*

YA: Ya.

DW3: Itu 10 kilometer, ok. Sebab bukti tak ada, saya kata saya tak tahu la.

[42] Regardless, what DW3 was told by road users is hearsay evidence.

[43] I now deal with whether there is any teeth in the singular and remaining issue in the repudiation letter dated 26 April 2019 and this action as to whether PW2 had driven the plaintiff's vehicle against the flow of traffic due to him being intoxicated at the time of the said accident which allegedly is a new discovery and a dominant factor leading to the repudiation of the policy.

[44] As alluded earlier, the defendant was already cognisant at the time of the settlement offer of all the other factors mentioned in the repudiation letter (save for intoxication). That the fact of intoxication was the dominant factor for repudiating the claim, was agreed by DW1:

Pg 162 of the NOE

YA: The last question i t appears that both counsel did not hear the answer correctly. So I am going to pose back to you the question which counsel ask and you give your answer. *Counsels question was, listen carefully, the dominant factor is not the vehicle by driven against the, the traffic but doing that whilst under intoxication? So do you agree or you do not agree?*

DW1: *Agreed*.

[45] DW4 (the defendant's fraud investigation executive) testified that he was informed by a tow truck driver by the name of Toto, that the driver of the vehicle was apparently intoxicated at the time of the accident. DW4 candidly admitted that he was unable to provide any other details about Toto apart from him allegedly being a tow truck driver. DW4 at p 361 of the NOE admitted in cross-examination that he assumed that PW2 was intoxicated based on information from Toto.

[46] Clearly, what Toto told DW4 is plainly inadmissible hearsay evidence.

[47] Added to that, it is noteworthy that DW4 also agreed under cross-examination that Toto would not have been able to know exactly who the driver of the plaintiff's vehicle was at the scene of the accident. This was due to the fact that there were many individuals present at the scene:

Pg 342 of the NOE

AK: Alright. *So, at best he would have guessed that someone was the driver of TBR1?*

DW4: *Correct.*

AK: Correct?

DW4: Correct.

AK: *Alright, that is the best thing he could have done.*

DW4: *Correct.*

AK: *He guessed one of the Chinese males there.*

DW4: *Yes.*

AK: *Was a driver of TBR1?*

DW4: *Correct.*

AK: And one of those guys appeared not sober?

DW4: Correct.

[48] Not only that, learned counsel for the plaintiff further submitted that the evidence shows that police officers were present at the scene of the accident, and two of the five police reports relevant to this case were in fact lodged by police officer. He postulated that PW2 would have been apprehended by the police officers who were present if indeed he was intoxicated.

[49] I agree. Actually, the evidence of the Investigation Officer DW2, Sub-Inspector Shamsudin shot down in flames any suggestion that PW2 was intoxicated at the time of the accident:

AK: Yes I'm obliged. Saya minta maaf Tuan Shamsudin. Ada beberapa soalan yang saya telah lupa menyual. Sarjan Shamsudin ... sorry *sub inspector Shamsudin setuju bahawa di dalam ... di dalam 5 repot yang dibuat ini, so kita boleh keluarkan repot oleh Lee Koon Teng. Di dalam tiga-tiga repot yang dibuat sama ada ... anggota polis atau pemandu kereta yang lain NCJ 4733, tiada disebut bahawa Lee Koon Teng adalah sama ada minum, atau mabuk, atau TBR 1 dibawa oleh seorang yang dalam keadaan mabuk?*

DW2: *Betul Yang Arif.*

[50] Confronted with such staggering evidence from DW1, DW2 and DW4, learned counsel for the defendant candidly admitted in para 26 of his submissions in reply that the defendant has no evidence that PW2 was intoxicated at the time of the accident. With the main plank of the defendant's repudiation grounded on intoxication blown to smithereens, he however sought to put up a valiant attempt to argue that para 3.2 of the repudiation letter 'your driver being under the state of intoxication had driven your vehicle on the wrong side of the road (*lawan arus*) along the MEX Highway' should be read disjunctively, and not conjunctively ie the act of driving under the state of

intoxication and driving on the wrong side o f the road (*lawan arus*) are two separate terms breached by PW2.

[51] This opportunistic posturing, with utmost respect to me, is akin to clutching at straws, and show desperation to the extreme to salvage the defence, as there can be no dispute that driving on the wrong side of the road was known to the defendant when it first made the settlement offer, and as discussed earlier in this judgment was not a disputation and as such moot.

[52] The defendant in resiling from the settlement offer, in addition, had assumed that PW2 was driving recklessly at the material time of the accident. In this regard, DW1's evidence is most telling:

> Pgs 156 & 157 NOE
>
> AK: ... *mean you just told the court that, you said it is not just about him dr iving, not just about him being intoxicated, he drove against the flow of traffic and then you said he drove for a, some distance, correct?*
>
> DW1: *Yes.*
>
> AK: *Alright and by that you assume it to be reckless?*
>
> DW1: Can I still elaborate further, My Lady?
>
> AK: No, I think this question I just want you to answer, first.
>
> DW1: *Okay, I will agree to that*.

[53] Further, the investigation Officer, DW2's evidence exploded the defendant's postulation of a possibility of PW2 being charged under s 42 of the Road Transport Act 1987 to point towards PW2's alleged reckless conduct. DW2 testified that a decision to charge under s 42 of the Road Transport Act 1987 would only be taken if the investigations revealed that PW2 had driven against traffic deliberately, without any reason. I do not find that PW2 had chosen to deliberately drive against the flow of traffic. If he had done so, as explained by DW2, PW2 would have been charged with a s 42 offence. Fact remains, he was not, after police investigations. The fact that the defendant's counsel had submitted PW2 passed five other cars and could have made a U-turn do not add to its case. This is because I have considered in the context of the present case, it is always tempting and easy, with advantage of hindsight, to, scrutinise with a probing eye, to apportion liability; when in actuality the acts and omissions may more reasonably be attributable to unforeseen circumstances. This court will not consider the matter from the perspective of hindsight and accept PW2's explanation on how he ended up driving against traffic flow, and I have not discounted the inherent probability that he was under extreme pressure — after losing control, to be driving against oncoming cars, the road was bent, there is a high barrier in between both lanes, his car (being a sports car) is low and he was panicking.

[54] In sum, the cumulative evidence of the defendant's own witnesses particularly DW1, DW2 and DW4 imploded the defendant's case founded on PW2 driving against the flow of traffic whilst being intoxicated. Analysed carefully, the defendant's witnesses' evidence as a whole do not destroy the probative value of PW2's evidence.

[55] This court has given due regard to PW2's explanation of the accident as to the circumstances that led him to lose control of the car which caused his car to spin and drive against the flow of traffic. His evidence was not credibly challenged in cross-examination. Thus, PW2's evidence on the cause of the accident ought to be accepted — see *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532 and *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1, where in the later case, the Court of Appeal held that:

> Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[56] In any event, PW2's evidence as to why he was driving against the flow of traffic and how the accident happened is not inherently improbable, and I accept his evidence. I feel confident to found my conclusion on his evidence because there is consistency in his police report and claim form, and this consistency is confirmed by DW1's evidence. In this regard, in assessing the facts in issue on the basis of their 'inherent probability or improbability' I have taken heed of the elucidations of the Federal Court in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773:

> [33] *It is trite that the inherent probability or improbability of a fact in issue must be the pr ime consideration in deciding whether a witness is credible or not. It is the duty of the court to sieve the evidence and to ascer tain what are the parts of the evidence tending to incriminate the accused which he accepted.* In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 79 Augustine Paul J (as he then was) summed up the tests for determining the credibility of a witness as follows:
>
> > *The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case* (see *Bhojraj v Sitaram* 1936 AIR PC 60). ... It must, however, be observed that being unshaken in cross-examination is not per se an all — sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105). *It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the cour t has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence wor thless and untrustworthy*

(see *De Silva v Public Prosecutor* [1964] 1 MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v State of Bihar* 1965 AIR SC 277). It is useful to refer to *Public Prosecutor v Datuk Haji H arun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p 19:

> In my opinion, *discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened... The question is whether the existence of certain discrepancies is sufficient to destroy their credibility*. There is no rule of law that the testimony of a witness must either be believed in i ts entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normal ly be accepted (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257). (Emphasis added.)

[57] On a consideration of the entire evidence, no doubt is left in my mind that there is any active concealment by the plaintiff, nor do I find a deliberate suppression fraudulently made by PW2 and/or PW1 and/or they failed to make full and frank disclosure in relation to the said accident. The evidence as a whole simply do not support the defendant's posit that the plaintiff had made any false reports or that the plaintiff's claim was fraudulent or exaggerated. The contention that the plaintiff has breached the duty of utmost good faith owed to the defendant is thus bereft of merits. I find instead from the cumulative result of the evidence adduced on both sides, that the defendant has not proven on the balance of probabilities that it is entitled to repudiate the policy.

[58] In arriving at a decision, I have not considered the defendant's arguments on competency of the authorised driver (PW2), refusal to provide a written statement at the meeting of 19 April 2019 where PW2 allegedly admitted to being intoxicated and refusing to give a further statement; requested documents allegedly not being furnished to the defendant as constituting grounds for repudiation as firstly, these were not pleaded. Second, these grounds depart from those stated in the letter of repudiation, and most importantly, were not put to the plaintiff's witnesses even if such allegations can be brought under the umbrella of 'breach of policy conditions'. This attracts the application of the principle in *Browne v Dunn* (1893) 6 R 67 as accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 and in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 — it must be taken that the plaintiff has abandoned his pleaded claim. The Court of Appeal in *Aik Ming*

applied the principle in *Browne v Dunn* and said:

> Now, all this is contrary to two fundamental rules of procedural fairness that operate in the environment of private law. The first of these rules relate to the pleaded case while the second has to do with the cross-examination of witnesses ... The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[59] In *Leong Kum Whay*, the Court of Appeal made plain the immutable corresponding duty on the part of an insurer to act with utmost good faith towards its insured. This duty endures to this day.

[60] This duty has been legislated in para 5(9), Schedule 9, Financial Services Act 2013 which stipulates plainly the defendant's duty of good faith in processing the plaintiff's claim:

> Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[61] I find it both fascinating and adventurous that the defendant evidently already having knowledge at the time of the settlement offer of all the factors mentioned in the repudiation letter (save the alleged intoxication which it miserably failed to prove at trial) could avail itself a complete *volte face*, by whipping up an argument allegedly based on 'new discoveries' to deny payment to the plaintiff. This, in my respectful view, hardly demonstrated good faith on the part of the defendant. Besides sounding hollow, it seems to me an ill conceived machination, and not to be countenanced by the court.

[62] In light of the findings made, it follows and I would answer the issues as follows:

(a) the defendant is not entitled to deny payment to the plaintiff on the grounds stated in its letter dated 26 April 2019 in repudiating the claim;

(b) the plaintiff is entitled to be indemnified from loss and recover the amount due to it on the policy; and

(c) the plaintiff is entitled to the declaration sought and judgment for the sum of RM1,505,250 being the market value on a total loss basis less excess clause.

[63] The measure of indemnity agreed under the policy is the market value of the car. I had applied the sum of RM1,505,250 as the market value on a total loss basis after deduction of excess. The market value of the car is not disputed by the defendant as this sum was in the first place offered by the defendant before it resiled from the settlement offer.

[64] The plaintiff's claim is accordingly allowed with interest, and costs subject to allocator.

Plaintiff's claim allowed, including payment of the sum of RM1,505,250.

Reported by Ashok Kumar